BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JUDITH K. HARWIG Claimant	)	
VS.	)	
HY-VEE, INC. Respondent	)	Docket No. 1,007,619
AND	)	
FIDELITY & GUARANTY INS. CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the March 19, 2008, Post Award Decision as amended by the March 20, 2008, Nunc Pro Tunc order, both entered by Administrative Law Judge Robert H. Foerschler. The Board heard oral argument on May 21, 2008. James E. Martin, of Overland Park, Kansas, appeared for claimant. Mark E. Kolich, of Lenexa, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found the increase in claimant's symptoms occurred after a fall at her home in November 2006, which he determined was an intervening injury, and, therefore, denied her request for post award medical and for review and modification of the original Award.

The Board has considered the record set out in the ALJ's Post Award Decision and Nunc Pro Tunc. In addition, the record contains a Stipulation Regarding Fringe Benefits filed March 14, 2008, wherein the parties agreed:

> 1. The respondent made a weekly payment of $58.33 for claimant's medical and dental insurance.
> 2. Respondent discontinued making such payment on March 9, 2007, the date of termination of claimant's employment.

> 3. Therefore, as of March 9, 2007 claimant's average weekly wage is determined to be $434.84 and the corresponding compensation rate is $289.91. All compensation awarded for any and all periods following March 9, 2007 shall be paid at the weekly rate of $289.91.[1]

Also, during oral argument to the Board, counsel for respondent clarified that respondent was not alleging claimant suffered any intervening accident or injury.

ISSUES

Claimant agrees with respondent that her fall at home in November 2006 was not an intervening accident. It was a temporary condition, and there is no evidence that the fall led to any permanent injury or aggravation of her preexisting condition.[2] Claimant asserts that respondent designated Dr. James Rahto as the authorized treating physician and that respondent should be ordered to pay for the medications prescribed by Dr. Rahto. Claimant also argues that her employment with respondent was terminated and, therefore, she has a change of circumstances and an increase in her disability. Claimant contends she is realistically unemployable and should be considered permanently and totally disabled. Finally, claimant contends that the parties have stipulated to an average weekly wage of $434.84 and a corresponding compensation rate of $289.91. Accordingly, she requests the review and modification be made effective March 9, 2007, her compensation rate should be amended to $289.91 due to her termination by respondent and resulting loss of health insurance, and compensation should be paid weekly for a permanent total disability until such time as she has been paid $125,000.[3]

Respondent argues that claimant is not entitled to review and modification. Respondent contends no evidence was produced of an increase in symptoms after the entry of the Award. Further, respondent asserts that claimant's medical expert, Dr. Edward Prostic, testified that claimant's complaints were the same and her physical examination was unchanged. Claimant's vocational expert, who concluded that claimant was unemployable, admitted he based his opinion on medical records that existed before the entry of the Award. Accordingly, respondent argues that claimant's capacity to work has not changed.

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[1] Stipulation Regarding Fringe Benefits (Mar. 14, 2008).

[2] There is testimony that suggests this fall was a direct and natural consequence of her work-related injury, but that question was not made an issue on appeal. In fact, during oral argument to the Board, counsel for the parties were asked if this was an issue and the parties agreed that neither intervening accident nor natural consequence were issues and that the November 2006 fall was not relevant to this appeal beyond reviewing the ALJ's reliance upon that incident for the denial of claimant's post-award requests.

[3] The ALJ's orders are silent as to claimant's attorney's fees, but this has not been raised as an issue on appeal.

Respondent also argues that because the ALJ did not address the issue of post award medical in the Post Award Decision, the Board does not have jurisdiction on that issue.

The issues for the Board's review are:

(1) Does the Board have jurisdiction on the question of post award medical? If so, is claimant entitled to additional post award medical benefits, including payment of past and future prescriptions ordered by Dr. Rahto and/or his associates and referrals?

(2) Should the Award be modified to find that claimant is now entitled to an award for a permanent total disability?

FINDINGS OF FACT

Claimant worked as a deli clerk for respondent, a grocery store chain, at its store on Quivira in Shawnee, Kansas. She was injured on July 29, 2002, after lifting a box of meat over her head to place it on a shelf. The box started tipping backwards, and claimant injured her back. An Award was entered in this case on May 3, 2006, finding that claimant had a 74 percent work disability. Compensation was awarded based upon an average weekly wage of $376.51 and a compensation rate of $251.02.

Claimant had surgery on her back in December 2002 and was eventually referred to Dr. Nick Navato for pain management. Dr. Navato started her on a regimen of pain relievers and muscle relaxers, and then referred her to her personal physician for monitoring of her condition. Claimant originally saw Dr. Greg Curry, who is with College Park Family Care Center (College Park), but switched to Dr. Rahto because of a personality conflict with Dr. Curry. Dr. Rahto is also a member of College Park. Claimant was also seen by Dr. Sean Wheeler, another physician in College Park, who is a specialist in pain management. Dr. Rahto testified that he had never spoken to Dr. Navato about claimant's regimen of medication and, in fact, had received no information from Dr. Navato at all about claimant. Drs. Rahto and Wheeler placed claimant on a regimen of medication that was different from that specified by Dr. Navato. One of the medications prescribed by Dr. Rahto was a Duragesic patch, a long-acting pain medication that gave baseline pain control. She was also prescribed Percocet for break-through pain. Claimant testified that when she used the Duragesic patch, she found she could function better. However, respondent would not approve use of the Duragesic patch. Claimant's pharmacist told her, however, that her personal health insurance plan would cover the cost of the Duragesic patch, and claimant started having her personal health insurance cover the cost of the prescription.

After her injury and surgery, claimant was unable to return to full-time work, but respondent allowed her to return to work part time. Claimant worked two hours per day, five days per week. She had a hard time because of the standing and walking, so she

would have to sit down. Out of the two hours she was at work, she actually only worked about an hour. But by continuing to work for respondent, she was able to keep her fringe benefits, including her health insurance. At the end of her two-hour shift, she would return to her car and cry because of her pain. At times she could not stand up because she would have no feeling in her feet. She fell on several occasions, but not at work.

On November 13, 2006, the store claimant worked at on Quivira merged with another of respondent's stores on Shawnee Mission Parkway. The store on Quivira was going to be closed, and the employees of the Quivira store were given the option of continuing to work for respondent at the Shawnee Mission Parkway store. Claimant opted to continue working for respondent at the Shawnee Mission Parkway store. However, before she started working there, she fell at home while getting out of bed. She said she woke up and had no feeling in her foot. As she attempted to get out of bed, she fell and hit her head on her night stand. After suffering pain for a few days, she collapsed in her bedroom. She was taken by ambulance to the hospital, where she was found to have some broken ribs. While she was in the hospital, she developed pneumonia. She also had a heart attack. She was given antibiotics in the hospital, and she lost her hearing on the right side because of the antibiotics. When she was discharged from the hospital, she went to California to stay with her sister, who took care of her.

Claimant testified she spoke with a woman she thought was the manager of the Shawnee Mission Parkway store in January 2007. She claims she told this woman where she was staying in California, and plans were made for her to take a leave of absence from work until sometime in mid-April 2007. However, when claimant arrived back from California, she found that she had been terminated by respondent. She had received a certified letter from respondent dated February 9, 2007, that indicated she would be terminated effective February 24, 2007, unless she took steps to extend her leave of absence. The letter had been sent to her son's home, where she had been living before going to California, and had been signed for by her young granddaughter. Claimant did not know about the letter until she returned in April.

Patricia Soetaert, the human resources manager for respondent's Shawnee Mission Parkway store, testified that she had never met claimant before her deposition and had never spoken with her. She said that the woman claimant allegedly spoke with in January 2007 was not the store manager, as Kevin Thalken was the store manager of the Shawnee Mission Parkway store and was also acting manager of the Quivira store. Ms. Soetaert said the two stores merged on November 13, 2006. The employees at the Quivira store were given the option of staying with respondent and going to work at the Shawnee Mission Parkway store and that claimant had chosen to continue working for respondent.

Ms. Soetaert testified that shortly after the stores merged, they were informed that claimant had fallen and cracked some ribs and would be off work from November 16 until December 11, 2006. Ms. Soetaert filled out a leave of absence form and sent it in to the corporate office. The leave form was signed by Kevin Thalken. Ms. Soetaert said that

upon receiving a medical leave form, corporate has a separate company, Matrix, investigate the leave request. Claimant was granted leave from November 17, 2006, through February 15, 2007. At some point, the February 15 date was extended to February 24, 2007. Pursuant to instructions from the corporate office, Ms. Soetaert drafted a letter to claimant on February 9, 2007. The letter included paperwork for claimant to fill out to request an extension of her leave of absence. The paperwork needed to be returned to respondent within 10 days. The return receipt from the certified letter showed it had been delivered on February 10, 2007, and that "M. Harwig" had signed for the letter. Since Ms. Soetaert had previously spoken with claimant's daughter-in-law, Michelle Harwig, she assumed this was who had signed for the letter.

Since respondent did not hear anything further from claimant, she was terminated on February 24, and her fringe benefits ended at that time. She continued to be paid until March 9, 2007, because she had some accrued vacation leave. With no health insurance, claimant was unable to afford the Duragesic patches that had been denied by respondent and that claimant had been getting through her personal insurance.

Dr. James Rahto is a family physician in private practice. Claimant became one of his patients in June 2006. Her main complaints were chronic low back pain related to a work injury, depression, anxiety, trouble concentrating, and memory problems. Dr. Rahto said claimant continues to have nerve pain that comes from her low back and goes down her legs, which could cause weakness in her legs. She has continued depression symptoms, low energy, low motivation, memory troubles, concentration troubles, and insomnia.

Claimant is on 10 different medications related to her accident. Some are related to her back pain and some are related to her secondary psychological issues from the chronic pain and losing her job. The Duragesic patch is a long-acting pain patch that gives baseline pain control. Celebrex is for pain and is an anti-inflammatory. Percocet is a quick-acting, short-term pain medication for break-through pain. Aricept and Namenda help with memory. Sinamet helps with muscle spasms claimant has from her pain and also for restless legs. Prozac helps her depression and anxiety symptoms. Phenergan is an antinausea medicine, because nausea is a side effect of her medication. Flexeril is a muscle relaxer to help with her back spasms. The Valium helps with anxiety and is a strong muscle relaxer. In Dr. Rahto's opinion, these medications constitute a reasonable and necessary course of treatment for claimant.

Dr. Rahto sees claimant once a month. The last time he saw her, she was doing better mood-wise. She was taking more pain medication. He believed claimant's mood had improved because of the increase in the amount of medication she was taking. Claimant is not on the Duragesic patch now. He thinks she should be back on the patch to decrease the amount of pain medication she is on. Claimant is now requiring large amounts of pain medication of the short-acting type, which are more addictive and build tolerance faster. Her use of those pain medications has gone up by three or four times

above the amount she was using when she was on the patch. The Duragesic patch is an opiate. The wearing of two Duragesic patches is something that would be prescribed for terminally ill cancer patients. Dr. Rahto said his goal is to get her off the patch with Cortisone injections and radio-frequency oblation of the nerves in the low back.

Claimant's long-acting pain medications give her a baseline pain coverage, and when she has a flare-up of pain, she takes a short-acting medication for that. When she was on the Duragesic patch, claimant was taking about 30 short-acting pills a month, which was down from close to 200 a month. Since the long-term medication has been taken away from her, her short-term medication use has increased. It is getting to the point that Dr. Rahto is uncomfortable prescribing them.

Dr. Edward J. Prostic, a board certified orthopedic surgeon, has seen claimant three times, all at the request of her attorney. He saw her two times in conjunction with her case-in-chief, and saw her again on July 20, 2007. At that time, claimant told him she had been doing reasonably well until she was terminated by her employer. She had been using Fentanyl patches (same as Duragesic) with Percocet for breakthrough pain. Since losing her health insurance, she has been unable to obtain those medicines. Other than pain control, no other treatment has been provided to claimant since he last examined her.

Claimant complained to Dr. Prostic that she had continued pain in her low back with radiation into both legs, the left worse than right. She occasionally would have shocking episodes in her legs. Her problems worsen with activity. She told him about her fall when she fractured her ribs and subsequently developed pneumonia. She said she developed hearing difficulties from the antibiotics and also had a heart attack. Subsequently, she has been diagnosed with mild Parkinson's disease.

Dr. Prostic did not remember that claimant told him how she fell. When told that claimant testified she fell because she had no feeling in her foot, Dr. Prostic said that kind of a fall would be consistent with the symptoms that she had as a result of her original accident, injuries and treatment.

After examining claimant, he found no change in her physical examination from the last time he examined her in January 2006. He found that claimant continued to have a failed-back syndrome following a two-level decompression and attempted arthrodesis. Claimant also continues to have her condition complicated by psychological distress. He did not think further orthopedic treatment such as surgery, injections, spinal cord stimulators, or physical therapy, would be of any benefit. He believed claimant needs psychological support and pain control. Claimant's pain is very real to her and is just as severe as if it were organic in cause.

Dr. Prostic stated that claimant would not be able to stop her narcotics immediately or she would go into withdrawal. However, he believes she needs to be weaned from those medications.

Dr. Prostic believes that claimant is going to be unable to find any job in the open labor market because of a combination of her relative lack of education and skills and her significant emotional and physical difficulties. He believes that claimant should have restrictions of no lifting weights greater than 20 pounds occasionally using her best body mechanics. She can do only minimal lifting frequently or constantly. She is unable to do more than occasional bending or twisting at the waist. She should not do forceful pushing or pulling, and she should not use any vibrating equipment. She should not do prolonged sitting, standing, or walking. She needs to be allowed to change position to the tolerance of her comfort. This would make her capable of dong only supervisory-type work or work that is more cerebral than she is trained to do. Plus, she could only do them on a part-time basis because she does not have the ability to stay at one work site for very long. Also, her condition is such that she would not be able to guarantee an employer that she could be available to work every day.

Michael Dreiling, a vocational consultant, visited with claimant on two occasions. He first saw her on January 3, 2006, at which time he prepared a list of the job tasks claimant performed in the 15-year period before her injury.

At the request of claimant's attorney, Mr. Dreiling again saw claimant on August 7, 2007, at which time he was asked to make an evaluation on the impact her injuries and ongoing medical difficulties were having on her vocational capacity to return to work in the labor market and to evaluate whether claimant is essentially and realistically employable in the open labor market. He was provided with medical reports and medical restrictions from various physicians.

Claimant told Mr. Dreiling that she completed nine grades of formal schooling in California. She quit school in order to get married. She acquired her GED during the same year she quit school. She ran a daycare center from the early 1980's through 1999. She has no typing or computer skills. She has no further academic or vocational training beyond her GED, which Mr. Dreiling said would limit the type of work she would be qualified to pursue, especially taking into account her limiting medical restrictions and her current age.

Claimant also told Mr. Dreiling that she has significant pain issues and continues to take various medications. Physically, she told him she could tolerate sitting for about 15 minutes and stand about 15 minutes. She is taken care of by her son and daughter-in-law and does not do her own laundry, cooking, cleaning or shopping. She no longer drives. Since her fall in November 2006, claimant has lost the hearing in her right ear and suffers from motion sickness.

Mr. Dreiling stated that based upon the totality of claimant's vocational profile, it is his opinion that she is essentially and realistically unemployable in the open labor market. She had been performing part-time, light duty work for respondent after her 2002 injury in order to keep her health insurance benefits. But she had been doing so with considerable

pain and discomfort. Mr. Dreiling testified that it is not reasonable to expect that claimant would be able to obtain other employment given her serious vocational deficits.

When Mr. Dreiling saw claimant in January 3, 2006, he reviewed the records of Dr. Navato. In reviewing those records in isolation from claimant's later medical records, Mr. Dreiling said claimant would have been totally disabled in terms of full-time employment at the time of her original Award. At the time of his earlier evaluation of claimant, Mr. Dreiling did not comment on the issue of claimant's employability but opined that if respondent had not created a position for claimant after her 2002 injury, claimant would not have been able to go out into the open labor market and obtain employment.

Issue 1: *Does the Board have jurisdiction on the question of post award medical? If so, is claimant entitled to additional post award medical benefits, including payment of past and future prescriptions ordered by Dr. Rahto and/or his associates and referrals?*

PRINCIPLES OF LAW

K.S.A. 2007 Supp. 44-555c(a) states in part:

> There is hereby established the workers compensation board. The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

K.S.A. 2007 Supp. 44-510h states in part:

> (a) It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

K.S.A. 2007 Supp. 44-510k states in part:

> (a) At any time after the entry of an award for compensation, the employee may make application for a hearing, in such form as the director may require for the furnishing of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge, in any county designated by the administrative

> law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523 and amendments thereto. The administrative law judge can make an award for further medical care if the administrative law judge finds that the care is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award. No post-award benefits shall be ordered without giving all parties to the award the opportunity to present evidence, including taking testimony on any disputed matters. A finding with regard to a disputed issue shall be subject to a full review by the board under subsection (b) of K.S.A. 44-551 and amendments thereto. Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556 and amendments thereto.
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> . . . .
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> (c) The administrative law judge may award attorney fees and costs on the claimant's behalf consistent with subsection (g) of K.S.A. 44-536 and amendments thereto. As used in this subsection, "costs" include, but are not limited to, witness fees, mileage allowances, any costs associated with reproduction of documents that become a part of the hearing record, the expense of making a record of the hearing and such other charges as are by statute authorized to be taxed as costs.

ANALYSIS AND CONCLUSION

K.S.A. 44-555c(a) limits the Board's jurisdiction to matters that have first been presented to and determined by an ALJ. Respondent contends that the Board does not have jurisdiction to review's claimant's request for medical benefits because the ALJ failed to address that issue in his Post Award Decision. The ALJ determined:

> It must also be recalled that the compensable injury to which this is all supposed to be causally related is a fall at work in late 2002. The onset of her current increase in complaints was falling at home in 2006. The change alleged in her condition happened then, in a context totally separate from her work and in spite of all the accommodations provided by her employer. If a motor vehicle accident had happened then, instead of a fall at home, there could be no viable modification of the award.[4]

Thus, the ALJ made a finding that claimant's current symptoms and need for treatment were attributable to an intervening accident and, therefore, were not the direct or natural result of her work-related injury. As such, the ALJ determined that respondent was not liable for the requested medical care and treatment. This constituted a determination by the ALJ of the claimant's request for post-award medical treatment. The Board has jurisdiction to review that denial of medical benefits.

Turning now to the merits of claimant's request, it must first be acknowledged that respondent is not alleging claimant suffered an intervening accident and injury. Therefore, the basis for the ALJ's denial of benefits does not exist. What remains is that claimant is

[4] Post Award Decision (Mar. 19, 2008) at 5.

in need of medical treatment. That is not disputed. Respondent likewise does not dispute that it authorized Dr. Rahto to be claimant's treating physician. What is disputed is whether respondent placed certain restrictions on Dr. Rahto's authority to treat claimant as he saw fit.

Respondent alleges that Dr. Rahto was only authorized to implement and to monitor the treatment plan previously devised by Dr. Navato. Dr. Rahto testified that he knew of no such limitation or plan. The record does not support respondent's allegation, and neither does common sense. Moreover, the law does not permit it. If a physician is authorized to provide medical treatment, then that physician cannot be prevented from providing such treatment as, in his professional opinion, is reasonable and necessary. Respondent is required to provide such treatment as may be reasonably necessary to cure and relieve the claimant from the effects of the work-related injury. If respondent was not satisfied with Dr. Rahto, then respondent could have authorized a different physician to provide claimant treatment or sought a hearing before the ALJ. Respondent did not do so. The treatment provided by Dr. Rahto was all related to claimant's work-related injury and is ordered paid as authorized medical treatment, as are his referrals and prescriptions, subject to the fee schedule.

Issue 2: *Should the Award be modified to find that claimant is now entitled to an award for a permanent total disability?*

PRINCIPLES OF LAW

K.S.A. 44-528(a) states:

> Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.

K.S.A. 44-510c states in part:

> Where death does not result from the injury, compensation shall be paid as provided in K.S.A. 44-510h and 44-510i and amendments thereto and as follows:
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> . . . .
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> (2) Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[5]

In *Wardlow*[6], the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills, making him essentially unemployable as he was capable of performing only part-time sedentary work.

The court, in *Wardlow*, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions, as being pertinent to the decision whether the claimant was permanently totally disabled.

ANALYSIS AND CONCLUSION

Claimant is realistically unemployable. She did not act in bad faith and was not terminated for cause as in *Ramirez*.[7] She should not be required to make a good faith job search, as in *Copeland*,[8] because she cannot work. That requirement should be limited to cases where work disability is at issue and not in cases of permanent total disability. The original award that was based on a work disability is inadequate. Furthermore, when this case was originally presented to the ALJ, neither party alleged that claimant was permanently and totally disabled. It was only alleged that she was entitled to an award of

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[5] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, Syl. ¶ 4, 522 P.2d 395 (1974).

[6] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

[7] *Ramirez v. Excel Corp.*, 26 Kan. App. 2d 139, 979 P.2d 1261, *rev. denied* 267 Kan. 889 (1999).

[8] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

permanent partial disability based upon her wage loss and task loss, which is a work disability. Now, on review and modification, it is alleged that claimant's disability has changed from a permanent partial disability to a permanent total disability. To the extent an additional change of circumstances may be required, claimant has lost her part-time job and the health insurance that came with that job. Claimant is entitled to an award of permanent total disability.

K.S.A. 44-536(b) mandates that attorney fees for services rendered to claimant be reasonable as determined by the Director. K.S.A. 44-555c states that review by the Board shall be upon questions of law and fact that have first been presented to and determined by the ALJ. The ALJ has not been presented with a request for attorney fees and has not made a determination of what fee is reasonable. Therefore, should claimant's counsel desire a fee for his services provided in this matter, then a request for the same should be presented to the ALJ.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Post Award Decision of Administrative Law Judge Robert H. Foerschler dated March 19, 2008, and the Nunc Pro Tunc order dated March 20, 2008, are modified as follows:

Claimant is entitled to 116.60 weeks temporary total disability compensation at the rate of $251.02 per week or $29,268.93, followed by 123.83 weeks of permanent partial disability compensation at the rate of $251.02 per week, followed by permanent total disability compensation at the rate of $289.91 per week, not to exceed $125,000 for a permanent total general body disability.

As of May 29, 2008, there would be due and owing to claimant 116.6 weeks of temporary total disability compensation at the rate of $251.02 per week in the sum of $29,268.93, plus 123.83 weeks of permanent partial disability compensation at the rate of $251.02 per week in the sum of $31,083.81, plus 64 weeks of permanent total disability compensation at the rate of $289.91 per week, in the sum of $18,554.24 for a total due and owing of $78,906.98, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $46,093.02 shall be paid at $289.91 per week until fully paid or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of May, 2008.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: James E. Martin, Attorney for Claimant
Mark E. Kolich, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge